YAZID SUFAAT & ORS

v.

SURUHANJAYA PILIHANRAYA MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR
RAUS SHARIF J
[COURT NO: R1-25-61-2004]
23 FEBRUARY 2006

CONSTITUTIONAL LAW: *Fundamental liberties - Right to vote - Applicants detainees under ISA in Kamunting - Unable to cast votes on day of election - Whether a denial of their rights - Whether Election Commission violated applicants' constitutional rights under art. 119 Federal Constitution - Whether applicants' right to vote must be at particular constituency where they are registered as electors - Whether there was a duty on the Election Commission to facilitate casting of votes by bringing applicants to respective constituencies - Whether applicants qualified to be postal voters under Regulation 3(1) of the Election (Postal Voting) Regulations 2003 - Whether the Election Commission had violated the applicants' rights under art. 8 and 10 of the Federal Constitution*

The applicants were Malaysian citizens and detainees under the Internal Security Act 1960 ('ISA') at Pusat Tahanan Kamunting, Perak. The respondent was the Election Commission ('Commission') set up under art. 114 of the Federal Constitution. When Parliament and the Legislative State Assemblies (except Sarawak) were dissolved on 4 March 2004, paving the way for the 11th general election for Malaysia, the applicants informed the Commission by way of two letters dated 15 March 2004 and 17 March 2004 of their right to vote, their intention to vote and for the Commission to facilitate the casting of their votes during the election. They had written a similar letter to the Commission on 20 March 2004. The 11th general election was held on 21 March 2004, but the applicants could not and were not able to cast their votes. This, according to the applicants, amounted to a denial of their rights to vote pursuant to art. 119 of the Federal Constitution. The Commission denied violating the applicants' constitutional rights under art.119 of the Federal Constitution and submitted, *inter alia*, that none of the applicants were voters registered in Kamunting but were registered in different constituencies in the country and that the applicants were all regular (walk-in) voters and not postal voters, thus it was the duty of the registered voters to go to the polling stations personally to

vote. The Commission further submitted that it was not the duty of the Commission to ensure that every registered voter will vote on polling day. The issues that arose were (1) whether the applicants' right to vote must be at a particular constituency where they have registered themselves as electors; (2) whether there was a duty on the Commission to facilitate the casting of votes by the applicants by bringing them to the respective constituencies where the applicants were registered as electors; (3) whether applicants were qualified to be postal voters under reg. 3(1) of the Election (Postal Voting) Regulations 2003 and (4) whether the Commission had violated the applicants' rights under art. 8 and 10 of the Federal Constitution.

Held (dismissing applicants' application):

(1) The applicants were registered as electors during the previous general election and being ISA detainees, the applicants were not convicted prisoners serving sentences of imprisonment. Thus, they were not disqualified from voting in the previous general election and had the constitutional rights to vote. However, their rights to vote must be at a particular constituency where they have registered themselves as electors. (paras 13 & 15)

(2) It was not the responsibility of the Commission to ensure that all electors would vote on polling day. Voting is not compulsory in Malaysia. It is left to the individual registered electors to go to the polling station of the constituency where his name has been registered as an elector. It was not the duty of the Commission to transport the applicants to the respective constituencies to enable them to vote on the polling day. (para 16)

(3) The applicants were not qualified to be postal voters under reg. 3(1) of the Election (Postal Voting) Regulations 2003 sub-paras (a) to (e). The applicants have not made any formal application to be registered as postal voters under reg. 3(1)(f) of the Election (Postal Voting) Regulation 2003. Under reg. 14A of the Elections (Conduct of Elections) Regulations 1981 the authoritative text of the electoral rolls must be submitted to the candidates on the day of nomination. The nomination day in the previous general election was 13 March 2000. Thus, the authoritative text should contain the names of the applicants as regular voters in the constituencies where they

have been registered. Therefore, since the applicants were not postal voters, there was no violation of their rights when the Commission did not provide them with the postal ballot papers. (para 19)

(4) The applicants were detained under the ISA, a law enacted under art.149 of the Federal Constitution which states that any law introduced for the purposes of curbing any activities that is prejudicial to public order or the security of the country or part thereof is valid notwithstanding that it is inconsistent with the provision of art. 5 (liberty of the person), art. 9 (prohibition of banishment, and freedom of movement), art. 10 (freedom of speech, assembly and association) or art. 13 (rights to property). Hence, when a person is detained under the ISA, he loses the aforesaid rights guaranteed under the Federal Constitution. Thus, the allegation that the Commission was violating the applicants' rights under art. 8 and 10 of the Federal Constitution was clearly misconceived. (para 20)

Case(s) referred to:
Loh Kooi Choon v. Government of Malaysia [1977] 2 MLJ 187 ***(refd)***
South African's case of August & Anor v. Electoral Commission & Ors [1999] SACLR Lexis 1 ***(refd)***

Legislation referred to:
Elections (Conduct of Elections) Regulations 1981, reg. 14A
Election (Postal Voting) Regulations 2003, reg. 3(1)(f)
Federal Constitution, arts. 5, 8, 10(a), 13, 114, 119, 149

For the applicant - Edmund Bon (Amer Hamzah Arshad, Edward Saw, LY Choy & Nik Mohamed Ikhwan with him); M/s Chooi & Co
For the respondent - Azizah Hj Nawawi SFC (Siti Salwa SFC with her)

Reported by Suhainah Wahiduddin

JUDGMENT

Raus Sharif J:

[1] In this application the applicants are seeking *inter alia* for the following orders:

(i) a declaration that the fundamental rights of the applicants to vote under art. 119 of the Federal Constitution in the 11th General Election has been violated by the respondent;

(ii) a declaration that the applicants' fundamental right to freedom of speech and expression under art. 10(a) of the Federal Constitution in the 11th General Election has been violated by the respondent;

(iii) a declaration that the applicants' fundamental right to equal protection under the law under art. 8 of the Federal Constitution in the 11th General Election has been violated by the respondent;

(iv) an order of *certiorari* to quash the decision and action of the respondent to their refusal, denial and neglect to enable and to allow the applicants to vote in the 11th General Election; and

(v) for punitive, aggravated and exemplary damages.

[2] The applicants are Malaysian citizen. They are all detainees under the Internal Security Act 1960 ("ISA") at Pusat Tahanan Kamunting, Perak.

[3] The respondent is the Election Commission ("Commission"), set up under art. 114 of the Federal Constitution. Basically, the duties of the Commission are to conduct elections to the House of Representatives and the Legislative Assemblies of the States and to prepare and revise electoral rolls for such elections.

[4] When Parliament and the Legislative State Assemblies (except Sarawak) were dissolved on 4 March 2004, paving the way for the 11th general election for Malaysia, the applicants informed the Commission by way of two letters dated 15 March 2004 and 17 March 2004 of their right to vote, their intention to vote and for the Commission to facilitate the casting of their votes during the election. They wrote a similar letter to the Commission on 20 March 2004.

[5] The 11th general election was held on 21 March 2004, but the applicants could not and were not able to cast their votes. This, according to the applicants, amounted to a denial of their rights to vote pursuant to art. 119 of the Federal Constitution.

[6] The Commission denied violating the applicants' constitutional rights under art. 119 of the Federal Constitution. The Chairman of the Commission in his affidavit, affirmed on 10 August 2005, stated *inter alia* as follows:

(i) Under art. 119 of the Federal Constitution, the applicants, being registered voters are entitled to vote for the particular constituency and at the particular polling station where his name has been registered as an elector;

(ii) None of the applicants are voters registered in Kamunting but are registered in different constituencies in the country;

(iii) The applicants are all regular (walk-in) voters and not postal voters. It is the duty of the registered voters to go to the polling stations personally to vote. The applicants have never applied to become postal voters; and

(iv) The duties of the Commission are to conduct the elections and to prepare the electoral rolls. It is not the duty of the Commission to ensure that every registered voter will vote on polling day.

[7] Encik Edmund Bon, leading counsel for the applicants in his submission basically submitted that the Commission had failed in its duty to ensure the applicants' rights to vote is preserved. According to him, the Commission has wide powers of, *inter alia* in ensuring that the constitutional rights of electors to vote under art. 119 of the Federal Constitution is preserved but has never considered and/or enacted provisions in law for detainees under preventive detention to exercise their rights to vote. According to Encik Edmund Bon, the failure of the Commission to make provisions to facilitate the applicants to votes in the last general election, was a breach of its duty, resulting in the applicants' constitutional rights to vote as being violated. He cited a *South African's case of August and Another v. Electoral Commission and Others* [1999] SACLR LEXIS 1 as the guiding authority.

[8] In *August and Another*, two applicants, a sentenced prisoner and a prisoner in remand awaiting trial, commenced an action against South African Electoral Commission for not making provisions to facilitate the registration of the applicants as voters, and further for not allowing them to cast their votes. In the action they sought orders to declare that all prisoners are entitled to vote and to require the South Africa Electoral Commission to make all necessary arrangements to enable them to vote. It was argued for the two applicants that the right to vote was a right entrenched in the Constitution and therefore the South Africa Electoral Commission was under "a duty to facilitate the registration of

prisoners who were eligible to vote as well as to create conditions enabling them to vote". The South African Electoral Commission cited, *inter alia*, administrative, logistical and financial difficulties as a reason if prisoners were allowed to vote in prison.

[9] The Constitutional Court of South Africa, *inter alia* held the followings:

(i) The right to vote by its very nature imposes positive obligations upon the legislature and the executives. Thus, the South African Electoral Commission which was under the duty to compile and maintain voters' rolls imposed an affirmative obligation to take reasonable steps to ensure that eligible voters are registered;

(ii) The right to vote is "so fundamental that a broad and liberal interpretation must be given to it. Every reasonable effort should be made to enfranchise citizens. Conversely, every case should be taken to guard against disfranchisement";

(iii) The right to vote is given in unqualified term, the applicants retained their rights to vote since Parliament had not passed any law limiting that right;

(iv) Election laws should be interpreted in a way which "enables enfranchisement" and which underline 'the positive responsibilities' of the Election Commission in facilitating registration and voting; and

(v) There are a variety of ways in which prisoners could be allowed to cast their vote in practice and administrative difficulties is not a reason to bar prisoners to exercise their rights to vote.

[10] Senior Federal Counsel, Puan Azizah Nawawi representing the Commission pointed out that *August and Another* must be read within the four walls of the South African Constitution. According to her, the South African Constitution with regard to the right to vote is very wide when compared to our very own constitution and thus is of little assistance.

[11] After reading *August and Another* closely, I am in agreement with Puan Azizah Nawawi. It appears to me that the South African's Constitution, particularly in relation to the powers and duties of their Election Commission is not similar to our Federal Constitution. The wordings of the two constitutions in respect of

the right of a citizen to vote are not similar. Hence, as aptly said by Raja Azlan Shah FC (as his Highness then was) in *Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187 that "whatever may be said of other constitution, they are ultimately of little assistance to us because our Constitution now stand in its own right and it is in the end the wording of our constitution itself that is to be interpreted and applied, and this wording can never be overridden by the extraneous principle of other constitution." I am adopting the same principle in this case.

[12] In Malaysia the right to vote is governed by art. 119 of the Federal Constitution which provides as follows:

(1) Every citizen who:

(a) has attained the age of twenty-one years on the qualifying date;

(b) is resident of the constituency on such qualifying date or, if not so a resident, is an absent voter; and

(c) is, under the provisions of any law relating to elections, registered in the electoral roll as an elector in the constituency in which he resides on the qualifying date.

is entitle to vote in that constituency in any election to the House of Representative or the Legislation Assembly unless he is disqualified under Clause (3) or under any law relating to offences committed in connection with elections; but no person shall in the same election vote in more than one constituency.

(2) If a person is in a constituency by reason only of being a patient in an establishment maintained wholly or mainly for the reception and treatment of persons suffering from mental illness or mental defectiveness or of being detained in custody he shall for the purpose of Clause (1) be deemed not to be resident in that constituency.

(3) A person is disqualified for being an elector in any election to the House of Representatives or the Legislative Assembly if –

(a) on the qualifying date he is detained as a person of unsound mind or is serving a sentence of imprisonment; or

A (b) having before the qualifying date been convicted in any part of the Commonwealth of an offence and sentenced to death or imprisonment for a term exceeding twelve months, he remains liable on the qualifying date to suffer any punishment for that offence.

B (4) In this Article:

(a) "absent voter" means, in relation to any constituency, any citizen who is registered as an absent voter in respect of that constituency;

C (b) "qualifying date" means the date on which a person applies for registration as an elector in a constituency, or the date on which he applies for the change of his registration as an elector in a different constituency,

D in accordance with the provisions of any law relating to elections.

[13] Clearly, from the above provisions, a citizen of this country is entitled to vote only if he is registered in the electoral roll as an elector in the constituency in which he resides on the qualifying E date and that he is not being disqualified as an elector at the material time. In this case there is no dispute that the applicants were registered as electors during the previous general election. They were registered as electors in the following constituencies:

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No.	Name	Constituencies	
		Parliament	State
1.	Yazid bin Sufaat	Ampang	Lembah Jaya
G 2.	Nik Adli bin Nik Abdul Aziz	Pengkalan Chepa	Panchor
3.	Ahmad Yani bin Ismail	Wangsa Maju	-
4.	Zainon bin Ismail	Baling	Kupang
H 5.	Abd. Samad Shukri bin Mohamad	Ampang	Bukit Antarabangsa
6.	Abu Bakar bin Che Doi	Baling	Kuala Ketil
7.	Mat Sah bin Mohd Satray	Pandan	Chempaka
8.	Md. Lotfi bin Ariffin	Baling	Kuala Ketil
I 9.	Idris bin Salim	Kota Melaka	Kesidang

10.	Muhamad Zulkepli bin Md. Isa	Baling	Kuala Ketil
11.	Mohd. Sha bin Sarijan	Gombak	Hulu Kelang
12.	Solehan bin Abdul Ghafar	Setiu	Batu Rakit
13.	Abdul Murad bin Sudin	Pasir Salak	Sungai Manik
14.	Mohd. Rafi bin Udin	Bandar Tun Razak	-
15.	Nordin bin Ahmad	Sepang	Sungai Pelek
16.	Asfawani bin Abdullah @ Ab. Wahab	Baling	Kuala Ketil
17.	Roshelmy bin Md. Sharif	Gelang Patah	Nusa Jaya
18.	Alias bin Ngah	Kuala Nerus	Teluk Pasu
19.	Suhaimi bin Mokhtar	Titiwangsa	-
20.	Muhamad Zulkifli bin Mohamad Zakaria	Lumut	Pasir Panjang
21.	Mat Salleh bin Said	Tambun	Hulu Kinta
22.	Khairuddin bin Saad	Sik	Jeneri

[15] There is also no dispute that being ISA detainees, the applicants are not convicted prisoners serving sentences of imprisonment. Thus, they are not disqualified from voting in the previous general election. Therefore, they have constitutional rights to vote. However, their rights to vote must be at a particular constituency where they have registered themselves as electors.

[16] Thus, the crucial issue is whether there is a duty on the Commission to facilitate the casting of votes by the applicants by bringing them to the respective constituencies where the applicants were registered as electors. To me, there is no such duty cast upon the Commission. This is because it is not the responsibility of the Commission to ensure that all electors would vote on polling day. Voting is not compulsory in Malaysia. It is left to the individual registered electors to go to the polling station of the constituency where his name has been registered as an elector. For an example, if a person is working in Kuala Lumpur on a polling day, but he is registered as an elector in the constituency of Kota Bharu, Kelantan, it is up to him to make the necessary arrangement to go back to Kota Bharu to exercise his right to vote. It is not the duty of the Commission to provide transportation for him to return to Kota Bharu, Kelantan to vote on the polling day. Similarly, it is not the duty of the Commission to transport the applicants to the respective constituencies to enable them to vote on the polling day.

[17] The applicants further contended that the Commission should have provided them the privilege of voting for the respective candidates in the Pusat Tahanan Kamunting and thereafter their votes be posted to the respective constituencies where there were registered as electors. But as pointed out by the Commission, the applicants were not registered as postal voters instead were registered as regular voters. As regular voters the applicants are not entitled to vote as postal voters.

[18] Under reg. 3(1) of the Election (Postal Voting) Regulations 2003 there are six instances where any person may be registered as a postal voter. Regulation 3(1) provides that:

> 3(1) Any person who has registered as a Parliamentary or State elector under the Elections (Registration of Electors) Regulations 2002, and is:
>
> (a) an absent voter;
>
> (b) a person certified by the Election Commission to be an election officer and liable for duties on polling day;
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> (c) a member of any police force established by any written law in force in Malaysia, other than a member of the Police Volunteer Reserve Force;
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> (d) a member of any of the public services who on polling day is employed full-time in a post outside Peninsular Malaysia or Sabah or Sarawak;
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> (e) a member of the Election Commission appointed under Article 114 of the Federal Constitution; or
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> (f) a member of any category of persons designated as postal voters by the Election Commission from time to time by notification in the Gazette,
>
> shall, on receipt of a postal ballot paper, be entitled to vote as a postal voter at an election in accordance with these Regulations.

[19] Clearly from the above, the applicants are not qualified to be postal voters under sub-paragraph (a) to (e). The only provision under which they can apply to be postal voters is under sub-regulation (f). But as pointed by the Commission the applicants have never made any formal application to be registered as postal voters under reg. 3(1)(f) of the Election (Postal Voting) Regulation

2003. Even, if the letters from the applicants can be said to be an implied application to the Commission to treat the them as postal voters, it is too late for the Commission to take the necessary actions. The Commission only received the first letter on 18 March 2004. Under reg. 14A of the Elections (Conduct of Elections) Regulations 1981 the authoritative text of the electoral rolls must be submitted to the candidates on the day of nomination. The nomination day in the previous general election was 13 March 2000. Thus, the authoritative text should contain the names of the applicants as regular voters in the constituencies where they have registered. Therefore, since the applicants are not postal voters, there was no violation of their rights when the Commission did not provide them with the postal ballot papers. The applicants are all regular votes and have to personally be present at the respective constituencies in order for them to vote.

[20] The applicants had also raised the issue of the violation of their fundamental rights to freedom of speech and expression under art. 10(a) and equal protection under the law under art. 8 of the Federal Constitution due to their inability to vote in the previous general election. To me, the violation of the applicants' right under arts. 8 and 10 of the Federal Constitution is a non issue. As stated earlier the applicants are being detained under the ISA. The ISA is a law enacted under art. 149 of the Federal Constitution which state that any law introduced for the purposes of curbing any activities that is prejudicial to public order or the security of the country or part thereof is valid notwithstanding that it is inconsistent with the provision of art. 5 (liberty of the person) art. 9 (prohibition of banishment, and freedom of movement) art. 10 (freedom of speech, assembly and association) or art. 13 (rights to property). Hence, when a person is detained under the ISA, he loses the aforesaid rights guaranteed under the Federal Constitution. Such deprivation of the rights is given by the constitution itself. Thus, the allegation that the Commission was violating the applicants' rights under arts. 8 and 10 of the Federal Constitution is clearly misconceived.

[21] For the above reasons, the application by the applicants is hereby dismissed with costs.